BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Frontier Communications Parent, Inc., Frontier California Inc. (U 1002 C), Citizens Telecommunications Company of California Inc. (U 1024 C), Frontier Communications of the Southwest Inc. (U 1026 C), Frontier Communications Online and Long Distance Inc. (U 7167 C), and Frontier Communications of America, Inc. (U 5429 C) For Rehearing of Resolution T-17734	A.___________

APPLICATION OF

FRONTIER COMMUNICATIONS PARENT, INC.
FRONTIER CALIFORNIA INC. (U 1002 C)
CITIZENS TELECOMMUNICATIONS COMPANY OF CALIFORNIA INC. (U 1024 C)
FRONTIER COMMUNICATIONS OF THE SOUTHWEST INC. (U 1026 C)
FRONTIER COMMUNICATIONS ONLINE AND LONG DISTANCE INC. (U 7167 C)
FRONTIER COMMUNICATIONS OF AMERICA, INC. (U 5429 C)
(COLLECTIVELY, "FRONTIER")

FOR REHEARING OF RESOLUTION T-17734

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Pursuant to Rules 16.1 and 16.2 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, Frontier Communications Parent, Inc. ("Frontier-Parent"),[1] Frontier California Inc. (U 1002 C) ("Frontier-California"), Citizens Telecommunications Company of California Inc. (U 1024 C) ("CTC-California"), Frontier Communications of the Southwest Inc. (U 1026 C) ("Frontier-Southwest"), Frontier Communications Online and Long Distance Inc. (U 7167 C), and Frontier Communications of America, Inc. (U 5429 C) (collectively, "Frontier") hereby apply for rehearing of Resolution T-17734 (the "Resolution"). The Commission issued the Resolution on October 13, 2021,[2] so this application is timely filed within 30 days under Public Utilities Code Section 1731(b)(1).

I. INTRODUCTION

Without legal justification or evidentiary basis, the Resolution adopts an "enforcement program" that will expose Frontier to exorbitant penalties, far beyond the range of potential fines applicable to other California telecommunications companies for the same conduct. For non-compliance with the "out of service" restoral[3] requirement in the Resolution alone, Frontier's annual penalties are up to $36 million a year, whereas the maximum *collective* penalty applicable to all other carriers subject to the Commission's existing penalty provision—in General Order ("G.O.") 133-D—is less than $8 million a year.[4] Penalties under G.O. 133-D are meted out proportionally based on the number of access lines. Under the Resolution, Frontier—which has only approximately 13% of the share of the working access lines amongst carriers subject to G.O. 133-D penalties—is subject to ***nearly five times*** the maximum ***combined*** penalties for all other applicable carriers. This is a massive 3000% increase of the maximum penalty of $1,167,300 that could be imposed on Frontier under G.O. 133-D (12.97% of $9 million). And to make the distinction between Frontier and other telecommunications carriers even starker, those

[1] Frontier-Parent is the successor in interest to Frontier Communications Corporation ("Frontier Communications") and the new parent company with 100% ownership of each of the Frontier operating companies in California.
[2] The Resolution incorrectly identifies the "date of issuance" as October 12, 2021. In fact, the Resolution was issued on October 13, 2021 at 7:40 a.m. *See* Attachment A.
[3] "Out of service" restoral is sometimes referenced using the acronym "OOS."
[4] Using the maximum penalty for all carriers subject to the G.O. 133-D "out of service" restoral penalty of $750,000 per month (or $9 million per year), and the collective scaling factors applicable to the three Frontier companies subject to the penalties of 12.97%, the maximum penalty applicable to the remaining non-Frontier carriers is $750,000 x 12 months x 87.03% scaling factor, for a total of $7,832,700. *See* G.O. 133-D § 9.3; Res. T-17736 at 5; Res. T-17743 at 5-6.

other carriers are penalized only following a "chronic failure" of multiple months. *See* G.O. 133-D §§ 9.1, 9.7. Those other carriers may also request the satisfaction of these penalties through direct investments in their infrastructure. *Id*.[5] Under the Resolution, however, only Frontier is required to pay enhanced penalties into the California General Fund without any opportunity for reinvestment *for each month* of non-conformance.

This result is not just unfair and competitively destabilizing, it is also unlawful. The Commission cannot, without proper notice, add new and different obligations on Frontier that were not identified in the decision authorizing the transfer of control in connection with Frontier's recent financial restructuring. *See* D.21-04-008 (the "Restructuring Decision"). The Resolution puts forth two alternative and inconsistent bases for singling out Frontier, but neither justifies the penalties created in the Resolution.

First, the Commission contends that the Resolution was authorized by the Restructuring Decision. Through that decision, the Commission approved as reasonable a settlement agreement in which Frontier agreed to incremental penalties for "out of service" restoral of up to $7 million, to be reinvested in Frontier's network (the "Settlement Agreement").[6] *Id.* at 68 (OP 4(a), Attachment 1 at 8 (Commitment #6), *see also id.* at 61 ("The Attachment 1 Settlement Agreement reflects reasonable compromises of the settling parties[] . . . and the settlement terms are soundly based in the evidentiary record."). The Commission specifically found as part of the Restructuring Decision that the "Settlement Agreement expands on Frontier's previous service quality commitments" and that the "additional commitments make it more likely that Frontier's service quality will improve after the Restructuring." *Id.* at 25.

The Settlement Agreement specifically included additional penalties for failure by Frontier to meet service restoral requirements. The Restructuring Decision approved the Settlement Agreement's "out of service" restoral mechanism without material adjustments. But the Resolution now takes the position that the Commission was free to ignore the terms of the Settlement Agreement and impose exclusively on Frontier millions of dollars of additional penalties not authorized by the Restructuring Decision. According to the Resolution, the

[5] Investments made in lieu of penalties must be twice the amount of the penalty. G.O. 133-D § 9.7

[6] The Restructuring Decision adopted three settlement agreements and other terms as part of its resolution of the Frontier transfer of control proceeding, but Frontier will refer to the Attachment 1 Settlement as the "Settlement Agreement" herein because only this settlement relates to the dispute raised through this application for rehearing. *See* D.21-04-008 at 68-69 (OPs 4(a), 4(b), 4(c)).

Commission was free to impose those additional penalties through the resolution process, without a properly noticed and scoped proceeding, the opportunity to provide evidence, or any of the other administrative procedures through which a new "enforcement program" should have been examined. *Resolution* at 15.

The Resolution is wrong. The Restructuring Decision cannot lawfully be read to disregard the carefully negotiated terms of the Settlement Agreement when the Restructuring Decision approved that same Settlement Agreement as fair and reasonable. To the extent that the Restructuring Decision authorized the Commission's Communications Division to develop a compliance program and to determine fines for failure to meet terms of the agreement, that authority could not be exercised in a fashion that conflicted with either the Restructuring Decision itself, or the terms of the Settlement Agreement that were approved in the Restructuring Decision. Here, the Resolution directly contradicts the Settlement Agreement approved by the Restructuring Decision. The Settlement Agreement authorized new incremental penalties of up to $7 million for Frontier's non-conformances with "out of service" restoral standards in the form of investment in infrastructure to improve service—on top of the existing G.O. 133-D penalties. The Resolution adopts a third layer of penalties related to the same standards, exposing Frontier to as much as $36 million in incremental annual penalties, to be paid into the California General Fund and therefore providing no benefit to the public or enhancing service quality. *Resolution* at 5. The Commission did not have the authority to impose those additional penalties through a Resolution without the required administrative process. The Commission's action will chill future applicants and proceeding participants, who cannot rely on assurances that the Commission will honor its approved settlements or the terms of its final decisions, even after parties place extensive detrimental reliance on negotiated and approved terms.

Second, the Commission argues that even if the Resolution was not authorized by the Restructuring Decision, the Resolution could be lawful under the Commission's "independent" authority to create a Frontier-specific penalty regime. *Resolution* at 3, 15. If the Commission wished to exercise any "independent" authority, it was required to follow the requisite administrative procedures for doing so. Here, the Commission has in place prior decisions adopting service quality enforcement standards on an industry-wide basis. *See* D.16-08-021 (adopting G.O. 133-D). To "rescind, alter, or amend" those prior decisions, the Commission must develop a record, make pertinent factual findings, and allow Frontier to be heard on the issues. *See* Pub. Util. Code §§ 1708, 1709. In adopting its enforcement program through the resolution process, the Commission did none of those things. There are no factual findings that justify the Resolution's excessive and discriminatory penalties that it uniquely imposes on Frontier—and those propositions that the Resolution offers are not supported by substantial record evidence. In addition, the Resolution relies on arbitrary, capricious, and unfounded reasoning, rendering it an abuse of discretion.

The Resolution's infirmities also cause constitutional violations. The extraordinary magnitude and disproportionate character of the Resolution's penalty scheme violates the "excessive fines" clauses of both the United States and California Constitutions. In establishing extreme penalties using a strict liability standard, applied only against Frontier and without considering the nature or extent of the conduct, the Resolution violates substantive due process protections under the Fourteenth Amendment to the U.S. Constitution. Further, the process by which the Resolution was adopted is a violation of Frontier's procedural due process rights: at the time the Commission approved Frontier's restructuring on April 14, 2021, Frontier did not have adequate notice that it was facing new Frontier-specific penalties for "out of service" restoral far beyond the Commission-approved Settlement Agreement—which itself included expanded "out of service" restoral requirements and penalty obligations. Nor did Frontier have an opportunity (through the informal Resolution process) to introduce evidence or meaningfully confront the extraordinary financial exposure that can now be inflicted under the Resolution. The Resolution violates the equal protection clause of the U.S. Constitution, and the California Constitution equivalent, because it exposes Frontier to potential penalties far greater than those applied to similarly situated entities without offering sufficient justification for that distinction. Finally, because the prescribed penalties for future data request responses apply to requests that have not yet been issued, those penalties are unconstitutionally vague.

These legal errors are grave and numerous and must be remedied on rehearing. The Resolution will cause severe damage to Frontier, which could impair Frontier's ability to continue improving its services for California consumers. In April 2021, the Commission found that Frontier's transfer of control and restructuring were in the public interest, concluding that "[t]he Restructuring, as supplemented by the Settlement Agreements and the additional terms, requirements, and conditions in Ordering Paragraph 4, is in the public interest and should be approved." D.21-04-008 at 66 (COL 3). However, after endorsing the Settlement Agreement and imposing numerous additional obligations and conditions on Frontier in connection with the restructuring, the Commission adopted this illegal Resolution that will impose new requirements and reduce Frontier's ability to invest in technologies and practices that better serve California consumers.

Frontier would never have accepted the terms of the Restructuring Decision if it had known that the Commission would adopt expansive new penalties that were not anticipated by any of the Settlement Agreements in the restructuring proceeding or the significant additional requirements in which Frontier acquiesced when it chose to accept the terms of the Restructuring Decision. Indeed, in the original decision issued by the Commission in the restructuring proceeding, Frontier and other parties exercised their rights to *reject* modifications to their Settlement Agreement that would have dramatically expanded Frontier's capital investment obligations in connection with the restructuring. *See* D.21-03-043 (original restructuring decision rendered void by non-acceptance); D.21-04-008 at 11. The Resolution enacts an even more divergent and onerous deviation from Frontier's agreed-upon expectations, but *outside of any lawful* process and beyond the scope of the Restructuring Decision. Frontier has never agreed to accept the unlawful penalty scheme in the Resolution, which violates numerous statutory, regulatory, and constitutional requirements. The Commission should promptly correct this erroneous result to avoid annulment of the Resolution by a reviewing court.

II. BACKGROUND

On April 14, 2020, Frontier Communications Corporation and its subsidiaries (the "Frontier Companies") filed a voluntary petition for Chapter 11 bankruptcy in the Southern District of New York. The petition sought relief from more than $10 billion in debt, in exchange for converting the unsecured noteholder's interests into equity positions. *See* D.21-04-008 at 6. The Plan of Reorganization set forth the mechanics of the restructuring, which the Bankruptcy Court approved on August 27, 2020. *Id.* at 7. The Frontier Companies emerged from bankruptcy on April 30, 2021, following the issuance of all necessary regulatory approvals.

On May 22, 2020, Frontier filed an application for approval of the parent company transfer of control contemplated by the Plan of Reorganization. D.21-04-008 at 8. Several parties protested the Application, but none questioned the benefits of the proposed Chapter 11 restructuring.[7] Instead, the protests focused on requesting that the Commission impose various

[7] Parties that protested the Application on June 29, 2020, included the Commission's Public Advocates

conditions on the transfer of control, including service quality requirements and a wide range of reporting and disclosure obligations.

From November 2020 to January 2021, Frontier engaged in a series of successful settlement negotiations with the protesting parties. These negotiations resulted in three Settlement Agreements that not only resolved the disputed issues in the proceeding but also formed meaningful compromises ensuring that the restructuring benefited California consumers. *Id.* Moreover, these Settlement Agreements laid the foundation for the Commission's ultimate approval of the restructuring. *Id.*

One of the settlements was with Cal Advocates, TURN, and the CWA—the Settlement Agreement. *Id.,* Attachment 1.[8] As part of this agreement, Frontier committed to enhanced service quality standards and expanded regulatory and reporting requirements. Specifically, Frontier agreed to undertake various actions to improve its performance with an emphasis on "out of service" restoral within 24 hours.

For more than five years, Frontier's three California Incumbent Local Exchange Carriers ("ILECs")[9] have been subject to a consistent set of service quality rules under G.O. 133-D, which prescribes a common set of industry-wide service quality standards and formula-based penalties for non-compliance. *See* G.O. 133-D §§ 3.3, 3.4, 3.5, 9.3, 9.4, 9.5.[10] The standards for "out of service" restoral are straightforward. To meet the standard, carriers must restore 90% of all "out of service trouble tickets within 24 hours." *Id.* at § 3.4(c). If carriers fall below this standard for more than three consecutive months, penalties apply, starting with a "base daily fine" of $25,000 per day, with downward adjustments using a "scaling factor" to reflect the percentage of total working lines that a carrier has relative to the statewide total. *Id.* at § 9.3. For 2020, the most recent year in which the G.O. 133-D penalties have been applied, the

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Office ("Cal Advocates"), the Communications Workers of America, District 9 ("CWA"), and consumer groups The Utility Reform Network ("TURN"), The Greenlining Institute ("Greenlining"), and the Center for Accessible Technology ("CforAT"). D.21-04-008 at 8-9. The Yurok Tribe, the California Emerging Technology Fund ("CETF"), and the Rural County Representatives of California ("RCRC") joined the proceeding at later dates, via separate motions for party status. *Id.* at 9-10.

[8] Frontier also entered into a settlement agreement with the CETF, *see id.*, Attachment 2 (CETF-Frontier Settlement), and another that addressed specific concerns raised by the Yurok Tribe regarding the condition of Frontier's network in the Yurok Tribe's Reservation, Lands, and ancestral territory. *Id.,* Attachment 3 (Yurok-Frontier Settlement).

[9] Frontier's California ILECs are Frontier-California, CTC-California, and Frontier-Southwest.

[10] Prior to the enactment of G.O. 133-D, earlier iterations of G.O. 133 applied on an industry-wide basis.

Commission imposed the following fines on AT&T's and Frontier's California ILECs:[11]

G.O. 133-D Out of Service Restoral Penalties for 2020

Service Quality Standard	**AT&T California (U 1001 C)**	**CTC-California (U 1024 C)**	**Frontier-Southwest (U 1026 C)**	**Frontier-California (U 1002 C)**
Out of Service Restoral Interval	$3,129,300	$34,800	$2,400	$967,725

In the process leading up to the Restructuring Decision, the parties to the Settlement Agreement expended significant effort and attention addressing explicit and substantial service quality provisions, including "out of service" restoral penalty conditions. The parties expressly negotiated, and Frontier committed, that each of its three California ILEC entities would be subject to additional incremental penalties—above and beyond the industry-wide G.O. 133-D penalties *starting in calendar year 2022*—if they fail to achieve an 80% "out of service" restoral in 2022 and 90% "out of service" restoral in 2023 and 2024. D.21-04-008, Attachment 1 at ¶ 6.

The Settlement Agreement was submitted through formal motions seeking approval of the terms as a resolution of these intervenors' concerns with Frontier's Application. *Id.* at 10. No party opposed approval of the Settlement Agreement. The Commission issued a proposed decision on February 12, 2021, which recommended approval. *Id.* at 11. However, the proposed decision also made the approval contingent upon acceptance of additional requirements that were never contemplated by the parties. On March 18, 2021, the Commission adopted the proposed decision as D.21-03-043. *Id.* As part of that decision, the Commission included a provision requiring the parties to "accept" the requirements that the Commission had added to the framework established by the Settlement Agreement. *Id.* On March 18, 2021, the same day that the decision was adopted, all of the parties to the Settlement Agreement filed a joint notice rejecting the new provisions added by the Commission. *Id.* This rendered D.21-03-043 void and the proceeding remained open. *Id.* A new proposed decision was prepared that responded to the parties' grounds for rejecting the first decision.

On April 20, 2021, the Commission formally issued its Restructuring Decision, which approved the restructuring subject to a series of conditions. *Id.* at 68-74 (OP 4). The Restructuring Decision adopted the Settlement Agreement and incorporated its terms. *Id.* at 67

[11] Res. T-17736 at 12-13; Res. T-17743 at 7. Based on the "working line" figures in these resolutions, AT&T has more than 2.5 times the number of working lines than Frontier's California ILECs.

(OPs 1-3). The Restructuring Decision adopted the Settlement Agreement without modification. The Restructuring Decision "clarif[ied]" how to calculate "out of service" performance, to whom the Commission's Communications Division referred, what an advice letter would contain, and to where certain notifications and documents shall be sent. *Id.* at 68 (OP 4(b)).[12] Moreover, the Commission noted its authority to enforce the settlement terms even if the Settlement Agreement terminated, thereby giving the terms of the Settlement Agreement the force of Commission regulation. *Id.* at 68-69 (OP 4(a), 4(c), 4(d)).

The Restructuring Decision did not provide for a rewrite or any revision of the Settlement Agreement's "out of service" restoral service quality requirements, including the $7 million incremental penalty framework to take effect in 2022. Nor in any way did it suggest that the approved penalty amounts would be revised or augmented. To the contrary, the Commission expressly endorsed the terms of the Settlement Agreement as "reasonable in light of the whole record, consistent with law, [and] in the public interest." D.21-04-008 at 66 (COL 1).

In addition to the requirements and commitments imposed through the Settlement Agreement, the Restructuring Decision imposed nine new and additional obligations on Frontier. The Commission's approval of the transfer of control was contingent upon Frontier's acceptance of these additional obligations. Among these conditions was Ordering Paragraph 4(f), which authorized the creation of an enforcement program for Frontier:

> (f) <u>Enforcement Program</u>. The Commission's CD shall draft a Resolution reflecting an enforcement program that covers compliance with the terms of this Ordering Paragraph, including, without limitation, Frontier's reporting requirements, service quality requirements, infrastructure investment requirements, and the terms of the Settlement Agreements. The proposed enforcement program will specify a citation amount for each term and proposed remedies for lack of compliance and shall be put before the Commission for consideration. The Commission's CD shall explore penalty mechanisms, including monetary fines and community investment mechanisms. Enforcement program appeals will be pursuant to Resolution ALJ-377 or its successor.

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[12] As to the Settlement Agreement, the Restructuring Decision included only the following limited statement related to the "out of service" restoral obligations:

> (i) The penalty set forth in paragraph 6 shall be calculated using the framework in the Attachment 1 Settlement Agreement augmenting the standard set forth by General Order (GO) 133-D and using data from Frontier's reports of its level of compliance with the Out of Service (OOS) standard as required under GO 133-D and any successor OOS standard adopted by the Commission.

D.21-04-008 at 68 (OP 4(b)).

Id. at 70 (OP 4(f)). Again, nothing in Ordering Paragraph 4(f) granted authority to the Commission or the Communications Division to impose new fines or penalties inconsistent with the terms of the Settlement Agreement or the G.O. 133-D requirements applicable to the telecommunications industry as whole.

Following the Restructuring Decision, the Communications Division staff used the Commission's resolution process to create and present its enforcement program, issuing a resolution in draft on July 16, 2021 (the "Draft Resolution"). Frontier filed timely opening comments on the Draft Resolution, explaining that the proposed penalty scheme exceeded the scope of the Commission's directives in the Restructuring Decision and raising constitutional problems. *Frontier Opening Comments on Draft Resolution T-17734* at 1-9. Frontier stressed that the Draft Resolution imposed penalty mechanisms not previously noticed, which will result in entirely new and exorbitant penalties even for unintentional non-conformances and inadvertent errors. *Id.*

A month of inaction followed the submission of the comments. Then, on September 16, 2021, the Commission released a revised version of the Draft Resolution (the "First Revised Draft Resolution"). The First Revised Draft Resolution retained the overall approach to the penalty scheme while modifying some of the specific language. Frontier responded to the First Revised Draft Resolution with a letter to the Communications Division outlining the continued problems with the enforcement program and highlighting the extreme and disproportionate nature of the "out of service" restoral penalties.[13]

A second revision to the Draft Resolution was issued on October 5, 2021 (the "Second Revised Draft Resolution"). The Second Revised Draft Resolution contained limited modifications. Again, the "out of service" restoral penalty mechanism was modified, but it remained divergent from the terms of the Restructuring Decision and remained the predicate for extremely large and disproportionate penalties applicable only to Frontier. Frontier sent another letter highlighting the problems with the Second Revised Draft Resolution, this time addressing it to all Commissioners and copying the Communications Division.[14] The letter asked the Commission to reconsider its approach, focusing on the "out of service" restoral penalties.

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[13] *Frontier Letter to Communications Director Osborn Regarding Revised Draft Resolution T-17734* (Sept. 20, 2021).

[14] *Frontier Letter to Communications Director Osborn Regarding Revised Draft Resolution T-17734* (Oct. 6, 2021).

After these two limited revisions, the Draft Resolution was adopted at the Commission's October 7, 2021 meeting. It was addressed on the consent agenda without discussion. During the time from the issuance of the Draft Resolution to the adoption of the Second Revised Draft Resolution, no formal hearings or evidentiary events occurred through which Frontier could be heard regarding the legal and equitable infirmities in the Staff's approach. The only vehicle for Frontier to raise these concerns was its opening and reply comments, and the two letters that it supplied following each revision to the Draft Resolution.[15]

The Resolution was officially issued through a Notice of Availability served on October 13, 2021. *See* Attachment A at 1. It serves two basic functions. First, the Resolution outlines penalties Frontier will be subjected to for "not fulfilling obligations." *Resolution* at 4-8. Second, it describes the process by which the enforcement program will be administered. *Id.* at 8-13.

The prescribed penalties fall into three categories: (1) "timely restoring service outages"; (2) "timely reporting"; and (3) "fully completing and submitting timely responses to data requests." *Resolution* at 4, 6, 7. Of these three categories, only the second is authorized by the Restructuring Decision. The Resolution's approach to "out of service" restoral penalties relies on G.O. 133-D reports, which are submitted quarterly to the Commission. The penalties are evaluated "for each of the three [Frontier] telephone corporations" that submit to those reporting requirements: Frontier-California, CTC-California, and Frontier-Southwest. *Resolution* at 5. For any month in which one of these companies falls below the standard of 90% restoration of outages within 24 hours, penalties apply:

Restoral Percentage	**Applicable Monthly Penalty**
Between 80% and 90%	$2.1 million
Between 70% and 80%	$2.4 million
Between 60% and 70%	$2.7 million
Lower than 60%	$3.0 million

Therefore, the Resolution imposes a potential penalty of $36 million per year on Frontier for the same "out of service" restoral standards. *Id.* These penalties are subject to a quarterly adjustment for the relative number of access lines between the three Frontier ILEC, which are currently 90% (Frontier-California), 9% (CTC-California), and 1% (Frontier-Southwest).

[15] *Frontier Letter to Communications Director Osborn Regarding Revised Draft Resolution T-17734* (Sept. 20, 2021); *Frontier Letter to Communications Director Osborn Regarding Revised Draft Resolution T-17734* (Oct. 6, 2021).

Resolution at 5.

The negotiated Settlement Agreement approved without substantial modification in the Restructuring Decision already imposed penalties for a failure to timely restore service outages within 24 hours at a 90% level. D.21-04-008, Attachment 1 at 8-9. It provided that if Frontier "fails to meet the applicable G.O. 133-D OOS restoral standard disaggregated by California ILEC and by copper plant in any month [between 2022 – 2024], the applicable California ILEC will be subject to an incremental tiered penalty beyond G.O. 133-D requirements of: up to $7 million/year if one or more of the three California ILECs misses the metric by more than 10%; or up to $3.5 million/year if any of the three California ILECs misses the metric by 10% or less." D.21-04-008, Attachment 1 at 8. The Settlement Agreement provided that Frontier shall pay the penalty for missing the "out of service" restoral performance standards by investing the amounts into service quality and network enhancement projects. *Id.* at 8-9. The particular projects selected were to be informed by input from "Cal Advocates, TURN, and CWA" regarding "potential areas for the expenditures, including potential expenditures on tribal lands and/or in tribal communities." *Id*. In contrast, the Resolution requires that the penalty amounts "go to the California General Fund instead of Frontier's network infrastructure." *Resolution* at 6.

The Resolution's penalties for untimely reporting are more straightforward. As to the various reports due under the Restructuring decision, Frontier will be "fined $1000 per day per utility number for each late or incomplete submission of a report." *Resolution* at 5. A grace period of five calendar days applies. *Id.* at 7.

The Resolution applies this same "$1,000 per day per utility number" formulation to Frontier's obligations to respond to any "data request" that is "late or incomplete." *Id.* This could include data requests from the Commission itself, Commission staff, Cal Advocates, the Compliance Monitor, or any of the parties to the settlement agreements. *Id*. The Resolution clarifies that the "$1,000 per day" penalty is evaluated based on each set of data requests, not question-by-question. *Id*. However, the Resolution does not explain what it means for a data request to be "incomplete." Similarly, it does not provide any reasonableness standards for the timeframe in which data requests must be addressed. Therefore, a data request could be deemed "late" based on an arbitrary, curtailed deadline established by the issuer of the request.

The Resolution contains limited formal findings, which consist largely of broad assertions and legal conclusions regarding Commission's authority and generalizations suggesting that the enforcement program will be beneficial. *Resolution* at 1, 18-19.

III. STANDARD OF REVIEW

The legality of the Resolution is measured according to the standard of review in Public Utilities Code Section 1757.[16] Section 1757 applies to the Resolution for two reasons.[17] First, the Resolution is an "enforcement proceeding" within the meaning of the statute. Since it was issued through the Commission's informal "resolution" process, the Resolution was not the product of a formally scoped proceeding, but its stated purpose and effect is "enforcement." The title of the Resolution confirms that it was issued to "[a]pprove the adoption of an Enforcement Program," and Ordering Paragraph 1 provides that the enforcement program will "govern the instances in which [Frontier] fails to meet and fulfill [its] obligations . . . ."[18] The Resolution establishes a range of penalties for specific conduct, thereby prescribing enforcement consequences for Frontier's compliance with Commission rules. These are the hallmarks of "enforcement." The fact that the Commission did not formally docket this matter or establish an official "adjudicatory" categorization for its consideration does not alter its character as an "enforcement" action under Section 1757.

Second, even if the Resolution were not an "enforcement proceeding," Public Utilities Code Section 1757 applies because the Resolution was initiated as an implementation vehicle for a "ratemaking . . . decision of specific application that is addressed to particular parties." [19] The Restructuring Decision was adopted in A.20-05-010, a proceeding formally categorized as

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[16] Frontier has standing to submit this Application. Each of the operating company subsidiaries is named in the Resolution, and the enforcement program adopted in the Resolution will impact all of these entities. Each of the operating company subsidiaries submitted "written comments on [the] draft . . . resolution" that led to the adoption of the Resolution, and so each has standing to file for rehearing under Rule 16.2(b). Frontier-Parent, too, has standing because it is the successor-in-interest to Frontier Communications Corporation, which was named in the Resolution. Frontier Communications Corporation was dissolved and replaced by Frontier-Parent, as reflected in a notice provided to the Commission on May 3, 2021. *May 3, 2021 Frontier Notice of Emergence.*

[17] Even if Section 1757.1 were erroneously applied, the same legal errors in the Resolution would exist, and Frontier's grounds for rehearing would be equally compelling. The only material difference in the standard is that Section 1757 includes an explicit ground for challenging a decision based on the lack of "substantial evidence." Pub. Util. Code Section 1757(a)(4). Because a decision that deviates from substantial evidence is also an abuse of discretion, the result under either statute is the same as applied to this application for rehearing. Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2); *see Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421, 438 (2003) (arbitrary and capricious actions constitute an "abuse of discretion"); *see also Zuehlsdorf v. Simi Valley Unified Sch. Dist.*, 148 Cal.App.4th 249, 256 (2007) (actions that are "not supported by a fair or substantial reason" are also arbitrary and capricious).

[18] *Resolution* at 1, 19 (OP 1).

[19] Pub. Util. Code § 1757(a).

"ratesetting."[20] The genesis of the Resolution was Ordering Paragraph 4(f) of the Restructuring Decision, although the Resolution exceeds the scope of that authority in material respects. Nevertheless, because the Resolution was conceived as a residual item from a "ratesetting" decision, absent correctly identifying it as an enforcement proceeding, the Resolution should be considered a "ratemaking . . . decision" because it involves a "specific application" and is "addressed to [a] particular part[y]," Frontier. Pub. Util. Code § 1757(a).

IV. SUMMARY OF GROUNDS FOR REHEARING.

The Resolution commits several material legal errors, which are more than sufficient to subject the Resolution to annulment by a reviewing Court:

1. In adopting penalties that conflict with the Settlement Agreement adopted in the Restructuring Decision and which are not authorized by the Restructuring Decision, the Resolution constitutes a failure to "procee[d] in the manner required by law" and an "abuse of discretion." Pub. Util. Code §§ 1757(a)(2), 1757(a)(5).

2. By expanding the penalties applicable to non-conformance with the Commission's current "out of service" restoral standards and applying these enhanced penalties uniquely to Frontier, the Resolution constitutes an unlawful modification of Commission G.O. 133-D without proper notice, opportunity to be heard, or observance of required procedures for changing Commission rules. Pub. Util. Code §§ 1757(a)(2).

3. The Resolution reaches conclusions that are "not supported by the findings" and "not supported by substantial evidence in light of the whole record." Pub. Util. Code §§ 1757(a)(3), 1757(a)(4).

4. The Resolution relies on arbitrary and capricious reasoning and ignores the Commission's own standards for determining the appropriate amount of penalties for prescribed conduct, which is a further "abuse of discretion." Pub. Util. Code § 1757(a)(5); D.98-12-075 at 35-36.

5. The Resolution enacts a framework by which exorbitant fines will be imposed on Frontier, far in excess of those applied to similarly situated utilities and disproportionate to Frontier's size, circumstances, and conduct. Penalties of this magnitude violate the "excessive fines clause" of the Eighth Amendment to the United States Constitution, parallel protections in the California Constitution, and substantive due process protections imposed by both the U.S. and California Constitutions. Pub. Util. Code § 1757(a)(6); U.S. Const. amends. V, VIII, XIV; Cal. Const., art. I §§ 7(a), 17.

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[20] *See* Res. ALJ-176-3462 (establishing categorization as "ratesetting"); A.20-05-010, *Scoping Memo and Ruling* (Aug. 5, 2020) (confirming "ratesetting" categorization). Ratesetting designations encompass proceedings where the Commission "sets or investigates rates," and also include proceedings that "do[] not clearly fit into any of the categories" in the Commission's rules. Rule 1.3; Rule 7.1(e)(2).

6. In adopting a penalty framework that exceeds the scope of the Restructuring Decision and the Settlement Agreement and collaterally attacks G.O. 133-D, the Commission failed to provide Frontier with meaningful notice and an opportunity to be heard, in violation of procedural due process requirements. Pub. Util. Code 1757(a)(6); U.S. Const. amend. XIV; Cal. Const. art. I § 7(a).

7. The Resolution denies Frontier "equal protection of the laws" under the U.S. and California Constitutions. Pub. Util. Code § 1757(a)(6); U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7.

8. The penalty mechanism applicable to future data requests with unknown characteristics, timeframes, and requirements is void under the constitutional "vagueness" doctrine under the due process clauses of the state and federal constitutions. Pub. Util. Code § 1757(a)(6); U.S. Const. amend. XIV., § 1; Cal. Const. art. I, § 7.

Any one of these material legal errors are sufficient for a reviewing court to annul the Resolution. Taken together, these substantive and procedural errors provide a compelling basis for rehearing.

V. THE RESOLUTION STEMS FROM AN UNLAWFUL PROCESS, CONTAINS INSUFFICIENT FACTUAL FINDINGS DIVORCED FROM SUBSTANTIAL EVIDENCE, AND PRESENTS ARBITRARY AND CAPRICIOUS REASONING THAT REFLECTS AN ABUSE OF DISCRETION.

A. The Resolution Exceeds the Authority Delegated By the Restructuring Decision and Contradicts the Expectations of the Parties to the Settlement Agreement.

The Resolution adopts a penalty scheme that is beyond the scope of the Restructuring Decision and contradictory to the terms of the carefully negotiated and agreed-upon Settlement Agreement that the Restructuring Decision approved. The Resolution's deviation from the Restructuring Decision renders it a failure to "proceed in the manner required by law" and an "abuse of discretion." Pub. Util. Code §§ 1757(a)(2), 1757(a)(5).

As the Court of Appeal has found, "a court of appeal will annul a decision by the Commission if the Commission failed to comply with its own rules and the failure was prejudicial." *Calaveras Tel. Co. v. Pub. Util. Comm'n*, 39 Cal.App.5th 972, 980 (2019) (annulling Commission resolution for failure to apply rules outlined in prior Commission decision). The Commission's duty to follow its own rules applies to Commission decisions, procedural requirements, and Commission general orders. *See id*. at 983 ("the Commission failed to proceed in the manner required by law and abused its discretion because its resolution . . . do[es] not conform" to the "implementing rules" designed to guide the resolution);

Southern Cal. Edison Co. v. Pub. Util. Comm'n, 85 Cal.App.4th 1086, 1090, 1105 (2000) (annulling decision and resolution based on conflict with the requirements of a preexisting Commission General Order); *Southern Cal. Edison Co. v. Pub. Util. Comm'n*., 140 Cal.App.4th 1085, 1104-06 (2006) (finding that the Commission violated its own rules and committed legal error by reaching conclusion on subjects outside the Scoping Memo).

The Restructuring Decision clearly defined the parameters of the enforcement program. It provided that the enforcement program must "cover[] compliance with the terms of this Ordering Paragraph [4] . . . ." D.21-04-008 at 70. The Restructuring Decision did not suggest that the Commission would expand the penalties or otherwise revise the "out of service" restoral requirements. Nor did it suggest the Commission would enhance the $7 million incremental penalty for "out of service" restoral commencing in calendar year 2022. A settlement reflects a compromise. Frontier agreed to incremental penalties up to a specified amount, and the Commission approved that compromise. It is entirely inconsistent with that approved compromise for the Commission to claim that the same decision that approved that compromise authorizes Commission staff to impose much higher penalties on Frontier.

The "Ordering Paragraph" contains eighteen sub-parts. D.21-04-008 at 68-74. None of the eighteen sub-parts identifies or authorizes additional penalties for "out of service" restoral.[21] *Id.* at 68-74. Rather, the Restructuring Decision specifically stated that the enforcement program should cover compliance with "the terms of the Settlement Agreement[]." D.21-04-008 at 70.

The Restructuring Decision did not modify the substantive terms of the Settlement Agreement; the scope of the "out of service" restoral requirements and penalties reflected therein were substantively unchanged. The Restructuring Decision merely authorized the Commission to "specify a citation amount for each term and propose[] remedies for *lack of compliance*" with the Settlement Agreement. D.21-04-008 at 70 (emphasis added). Therefore, the scope of the Resolution must be aligned with the terms of the Settlement Agreement, which provides that Frontier must either meet the "out of service" restoral performance standards in the time periods identified in the Settlement Agreement ***or*** pay a specified fine. D.21-04-008, Attachment 1 at 8.

The Resolution imposes new and incremental penalties on Frontier even when Frontier

[21] Sub-parts (b)(i), (k), (m)(vii) and (m)(viii) reference "out of service" or "OOS" restoral standards, but these sub-parts only purport to clarify non-substantive items about the settlement agreements, like the establishment of a tribal liaison to include "out of service" restoral issues.

fully complies with the Settlement Agreement. Under the Settlement Agreement, Frontier is subject to a maximum penalty of $7 million per year commencing in calendar year 2022 if it fails to meet the requirements of the Settlement Agreement. D.21-04-008, Attachment 1 at 8. In contrast, the Resolution imposes a potential maximum penalty of $36 million on Frontier. *Resolution* at 5. In addition, the Settlement Agreement applies the penalties as incremental investments starting in calendar year 2022. D.21-04-008, Attachment 1 at 5, 8-9. This means that the monetary penalties inflicted on Frontier are dedicated to improving Frontier's "service quality and network enhancement projects" so that Frontier is better able to meet the "out of service" performance standards going forward. *Id.* In contrast, the Resolution requires immediate payment to the California General Fund. *Resolution* at 6 ("Most importantly, all of these payments will go to the California General Fund instead of Frontier's network infrastructure.")

These differences materially deviate from the expectations of the parties to the Settlement Agreement and confirm that the Resolution did not faithfully implement the Restructuring Decision. After weeks of focused negotiations and compromise, Frontier entered into a Settlement Agreement with three other parties, knowing that it provided for satisfaction of substantial penalties through incremental investments. The Restructuring Decision did not authorize the Commission or its staff to create a new or wholly separate set of penalties that could be satisfied only by payment to the State of California. The Resolution denies Frontier of the benefits that result from the settlement that had been negotiated through compromise and specified that Frontier would make substantial incremental investments targeted to improve service quality performance.

If the Commission believed, as the Resolution states, that the "reinvestment of fines is not an effective deterrent to ongoing violations," the correct and procedurally appropriate course was to modify the negotiated Settlement Agreement as part of the Restructuring Decision. The Commission could have pursued this option, which, by Commission rules, would have then afforded the settling parties an opportunity to accept or reject the Commission's modification.[22] The Commission elected not to modify the Settlement Agreement as part of the Restructuring

[22] *See* Rule 12.4(c) ("The Commission may . . . [p]ropose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.").

Decision, instead endorsing the settlement terms without material adjustment. Moreover, the Restructuring Decision did not authorize the Commission to identify new or increased penalties beyond the specific "out of service" restoral penalties included in the settlement. Nor did the Restructuring Decision authorize the Commission to identify different requirements (to the State of California instead of in the form of incremental investments) for the penalty payments to which Frontier agreed. Rather than penalizing Frontier for failing to abide by the Settlement Agreement, the Resolution imposes new requirements and additional penalties on Frontier for failing to meet certain "out of service" performance standards regardless of whether Frontier fully and completely abides by the Settlement Agreement and pays the agreed-upon and approved penalties. *Resolution* at 4-6.

The Resolution incorrectly suggests that its authority to create an enforcement program was "without limitation." *Resolution* at 3 ("The Commission explicitly indicated this enforcement program will have no limitations . . . ."); D.21-04-008 at 70. But the "without limitation" language is tethered to "the terms of this Ordering Paragraph," and so it still requires the Commission to confine its implementation efforts to the Restructuring Decision. *Restructuring Decision* at 70. The full text of the sentence is:

> The Commission's [Communications Division] shall draft a Resolution reflecting an enforcement program that covers compliance with the terms of this Ordering Paragraph, including, without limitation, Frontier's reporting requirements, service quality requirements, infrastructure investment requirements, and the terms of the Settlement Agreements.

D.21-04-008 at 70 (OP 4(f)). The "without limitation" phrase refers to "the terms of this Ordering Paragraph." It says only that the enforcement program is not constrained to "reporting requirements, service quality requirements, infrastructure requirements, and the terms of the Settlement Agreements."[23] It still means the Commission's authority is limited to ensuring compliance with the terms of the Ordering Paragraph.[24] *See, e.g.*, *Southern Cal. Edison Co.,*

[23] The term "without limitation" is a qualifying phrase to avoid the misplaced inference that the enforcement program would only apply to "reporting requirements, service quality requirements, infrastructure investment requirements, and the terms of the Settlement Agreements." For example, without this phrase, Ordering Paragraph 4(f) could be misinterpreted to exclude the "right of first offer" in Ordering Paragraph 4(g).

[24] Likewise, the Resolution's directive to "explore penalty mechanisms" must be read in the context of the entire Ordering Paragraph; it is not a boundless authorization to penalize Frontier in any way that the Staff conceives, including revising the Commission approved settlement to increase the penalties for "out of service" restoral requirements beyond those applicable to the remainder of the telecommunications

supra, 85 Cal.App.4th at 1105-6 (2000) (finding that the Commission exceeded its authority by failing to explain how its alleged practice conformed with its own general order or the Public Utilities Code).

Because the language immediately following the term "without limitation" includes the Settlement Agreement, clearly the Restructuring Decision's direction was to implement the Settlement Agreement without adjustment. Had the Commission intended to modify the Settlement Agreement, it had ample opportunity to do so in the Restructuring Decision. In fact, in an earlier decision in the restructuring proceeding, the Commission tried to modify the Settlement Agreement by proposing material amendments to its terms. *See* D.21-03-043 at 11. The Commission's proposed modified version was rejected by the parties. *Id*. The Commission cannot now circumvent the Settlement Agreements, the Restructuring Decision, and the Commission's rules by creating an enforcement program that effectively amends the Settlement Agreement without the parties' consent. Modifying the specific terms of the Settlement Agreement as incorporated through the Restructuring Decision is no different than if the Commission were to issue a resolution directing Frontier to spend $10 billion in capital expenditures as opposed to the $1.75 billion authorized in the Restructuring Decision. *See* D.21-04-008 at 51, 61. In both situations, the terms of the Restructuring Decision and its incorporated Settlement Agreement must govern.

The Commission cannot empower itself through the informal resolution process to create an enforcement program "without limitation." The Commission must still follow lawful process in adopting an enforcement program and stay within the confines of its directives in the Restructuring Decision. It did not.

B. The Resolution Is an Impermissible Collateral Attack on G.O. 133-D.

Whereas the rest of the telecommunications industry continues to operate under a consistent set of standards in G.O. 133-D, Frontier alone is now subject to additional penalties, of up to $36 million per year, for the very same actions. This end run on existing law is not only unfair—especially in the context of a Chapter 11 restructuring that clearly provides public interest benefits (*i.e.*, the elimination of debt)—it is incompatible with statutory requirements, Commission rules, and due process requirements.

The Resolution conflicts with G.O. 133-D. The "out of service" restoral standards in

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carriers in California. *Resolution* at 15.

both G.O. 133-D and the Resolution set the same goal of restoring 90% of "out of service" trouble reports within 24 hours. *See* G.O. 133-D § 3.4(c); *Resolution* at 5. But the consequences of not meeting that standard are different. The Resolution is far more punitive, establishing penalties nearly five times greater on Frontier than are applicable to all other carriers subject to the G.O. 133-D penalty mechanism combined. *See* G.O. 133-D § 9.3; Res. T-17736 at 5; Res. T-17743 at 5-6. And rather than triggering penalties based on "chronic failure," as occurs under G.O. 133-D, the Resolution's new penalties are subject to a strict liability standard, applying every month for which the 90% standard is not met, regardless of the reason for non-compliance. *Compare* G.O. 133-D § 9.1; *Resolution* at 5. As such, Frontier is subject to far greater penalties than other carriers even when Frontier's "out of service" restoral performance is better than or exactly the same as that other carrier, and without regard to the reason for any non-compliance on Frontier's part. This constitutes a modification of G.O. 133-D for Frontier alone.

As a matter of law, the Resolution cannot modify G.O. 133-D in this way—especially where the Restructuring Decision's scope did not encompass modifications to G.O. 133-D. G.O. 133-D was adopted in 2016 following extensive multi-year proceedings that began in 2011. *See* D.16-08-021; R.11-12-001. "Out of service" restoral performance fit squarely within the scope of those proceedings, and the issue was resolved by the final G.O. 133-D decision. *See* D.16-08-021. A full administrative process ensued, spanning multiple years, and in which many parties submitted numerous comments. The feasibility of the standards and the equities surrounding the penalty mechanisms were all considered during the process. A final decision was issued in 2016 and upheld on rehearing in 2018. *See* D.16-08-021; D.18-10-058. No appellate actions were filed within the statutory timeline, and so G.O. 133-D became final and non-appealable. It cannot now be collaterally attacked and revised—indeed, undermined—through a separate proceeding that was not properly scoped or noticed. *See* Pub. Util. Code § 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."); *People v. Western Air Lines*, 42 Cal. 2d 621, 630 (1954) ("When its determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings."); *Southern Cal. Edison Co. v. Public Utilities Comm'n*., 128 Cal.App.4th 1, 7 (2005) (finding Edison is barred from challenging final Commission decisions under section 1709 and res judicata).

C. The Conclusions Contained in the Resolution Are Not Supported By Its Findings and These Findings Are Not Grounded in Substantial Record Evidence.

Commission orders, including resolutions, must contain specific findings that support the conclusions reached and actions ordered. Pub. Util. Code § 1757(a)(3). These findings must be supported by "substantial evidence in light of the whole record." Pub. Util. Code § 1757(a)(4); *Pedro v. City of Los Angeles*, 229 Cal.App.4th 87, 99 (2014) (Evidence will not be considered "substantial" unless it constitutes "evidence that a rational trier of fact could find to be reasonable, credible, and of solid value."). The Resolution fails to make findings sufficient to justify its penalty provisions, and it fails to support its findings with substantial evidence in light of the whole record.

1. The Conclusions Contained in the Resolution Are Not Supported By Its Findings.

None of the Resolution's findings establish a nexus between the Resolution's penalties and the Restructuring Decision. Nor is there a factual basis that justifies the Resolution's unprecedented and unique penalties. The findings address generalized, ancillary, and mechanical topics, but none support enhanced enforcement imperatives for Frontier, much less penalty provisions that would result in Frontier being subject to penalties far greater than competitors who are far larger than Frontier.

The Resolution contains 13 formal findings, presented in a section of the Resolution called "Findings and Conclusions." *Resolution* at 17-18.

- Findings 1 through 5 provide legal assertions regarding the scope of the Commission's enforcement authority and the extent to which tasks can be delegated to Commission Staff.

- Finding 6 is a conclusory statement, without any reference to corroborating facts or supporting reasoning, suggesting that enforcement programs "encourage compliance" with Commission rules.

- Findings 7 through 9 are a series of disclaimers about rights that the enforcement program does not impact.

- Finding 10 is a generic statement about the Commission's confidentiality process.

- Finding 11 refers to the Commission's "guiding principles" on enforcement, and it asserts without explanation that there is a connection between that policy and this Resolution.

- Findings 12 and 13 contain information about the mechanics of comments on the Draft Resolution and summary information about the prior Restructuring Approval Proceeding.

None of these findings explains how the expansive "out of service" restoral penalties are rationally related to Ordering Paragraph 4(f).

Moreover, the Resolution fails to recognize that during the first six months of 2021, Frontier reported to the Commission and met the "out of service" restoral standard for all three companies in four months, and only narrowly missed the 90% objective in the other two months.[25] This is in contrast to some other providers, who have continued to fall substantially below the standard. As such, the Resolution's findings are insufficient to sustain the conclusions of the Resolution and incomplete in that they do not account for Frontier's recent service quality performance.

These skeletal findings are insufficient to warrant the Resolution's orders. And none justifies imposing penalties on Frontier that exceed those in G.O. 133-D and those agreed upon in the adopted Settlement Agreement.

2. The Resolution's Findings Contained Are Not Supported By Substantial Evidence.

There is no substantial record evidence to support the Resolution's findings. If the Commission is relying on independent enforcement authority outside of the Restructuring Decision, it has to point to factual propositions backed by substantial record evidence to demonstrate a basis for singling Frontier out for penalties that do not apply to any other carrier in California. Pub. Util. Code, § 1757(a)(4) (findings must be supported by "substantial evidence in light of the whole record"). No record evidence supports treating Frontier differently.

The Commission suggests that Frontier has been in "chronic failure status" for the past two years and that Frontier has been subject to fines under G.O. 133-D since the penalty

[25] As Frontier explained in its October 6, 2021 letter and accompanying exhibit sent to the Commissioners and CD: "In the six months reported in 2021, Frontier has met the OOS standard for all companies in every month but for January for Citizens Telecommunications and January and February for Frontier California—the companies narrowly missed the 90% objective in those months." *See October 6, 2021 Letter* at 3. In February 2021, "Frontier California's 'out of service' restoral rate was 88.3% in 24 hours." *Id.* The Commission should take official notice of its own service quality reports and records, which confirm these figures. Rule 13.10; Evid. Code § 452(c), (h); *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143-144, 146 (judicial notice proper of orders, records and files of the Commission); *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750 (court can take judicial notice of records and files of state administrative agencies).

mechanism came into effect. *Id.* at 16. But the Commission does not justify such punitive treatment, let alone for only Frontier. Significantly, AT&T has consistently failed to meet the "out of service" restoral requirements in G.O. 133-D. For example, the Resolution ignores that between 2017 and 2019, AT&T "out of service" performance has been consistently worse than Frontier-California's performance:

Average Out of Service Restoral Rate in 24 Hours			
Company	**2017**	**2018**	**2019**
AT&T	49.18%	57.30%	45.36%
Frontier-California	70.08%	79.18%	53.72%

See Res. T-17731, Res. T-17721, Res. T-17652, Res. T-17655, Res. T-17631, and Res. T-17625. Yet the Resolution does not subject AT&T to the same penalties as Frontier.

The baselessness of the Resolution's conclusions are evident from the fact that Resolution T-17736 (June 24, 2021) imposed more significant G.O. 133-D penalties on AT&T than Frontier because of its relative size. For example, from July to December 2020, AT&T California's "out of service" restoral ranged from a low of 26.6% to a high of 57.7%, averaging in the 40% to 50% range. Res. T-17736 at 6. By contrast, the three Frontier companies consistently achieved higher restoral rates and have regularly been in the 80% to 90% compliance range since July 2020. *See* Res. T-17736 at 6-7; Res. T-17743 at 6; *see October 6, 2021 Letter* at 3, Attachment. But despite AT&T's comparatively lower "out of service" performance, only Frontier is subject to the heightened penalties of the Resolution.

There is also *nothing* in the record, let alone substantial evidence, justifying the disproportionate amount of the "out of service" penalties, which could total as much as $36 million per year for Frontier. To justify the extraordinary and disproportionate penalties that the Resolution adopts, the Commission has to establish a record that, among other things, quantifies the harm from Frontier's service quality shortcomings, evaluates the impact on ratepayers, considers how Frontier's performance compares to others, examines the actual impacts of service quality investments under G.O. 133-D, and performs an assessment of the deterrence value of specific levels of penalties relative to Frontier's size, resources, conduct, and other pertinent factors. *See* D.98-12-075 at 35-36 (outlining five-factor test for evaluating the level of penalties that are appropriate to specific conduct). The Commission did none of this.

D. The Resolution Relies on Arbitrary and Capricious Reasoning That Constitutes an Abuse of the Commission's Discretion.

The Resolution compounds its lack of evidentiary support by advancing "arbitrary and capricious" reasoning, which amounts to an abuse of discretion. Pub. Util. Code § 1757(a)(5); *see also Woodbury, supra,* 108 Cal.App.4th at 438 (arbitrary and capricious actions constitute an "abuse of discretion"); *Zuehlsdorf, supra,* 148 Cal.App.4th 249, 256 (actions that are "not supported by a fair or substantial reason" are also arbitrary and capricious); *San Pablo Bay Pipeline Co. LLC v. Public Utilities Comm'n*, 221 Cal.App.4th 1436, 1460 (2013) ("The abuse of discretion standard can be restated as whether the Commission exceeded the bounds of reason.").

First, as explained above, the Commission relies on an erroneous reading of "without limitation" in Ordering Paragraph 4(f) of the Restructuring Decision. *Resolution* at 3. Regulatory directives, like statutes, must be interpreted according to the canons of statutory construction: "[A]n agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision." *Southern Cal. Edison*, *supra*, 85 Cal.App.4th at 1105 (citing *Reading Med. Center v. Bonta*, 75 Cal.App.4th 478, 484 (1999)). The plain text of Ordering Paragraph 4(f) compels the enforcement program to be consistent with "terms of this Ordering Paragraph." D.21-04-008 at 70 (OP 4(f)). Because it is not, the Resolution is arbitrary and capricious.

Second, the Resolution asserts an incorrect and overly expansive view of the Commission's authority. Despite the Commission's broad regulatory powers, it does not have "authority to establish any penalty scheme it deems appropriate either in conjunction with or in parallel to any existing Settlement Agreements." *Resolution* at 3. To the contrary, if the Commission were relying on its generic regulatory authority to adopt new and substantially increased (*e.g.*, $36 million) penalties for Frontier, it would have had to follow proper administrative law procedures, including scoping a proceeding, building a record, and providing a full opportunity for Frontier to submit evidence and defend against such a grievous loss.[26] If

[26] *See, e.g.,* Rule 7.1(d) ("An order instituting rulemaking shall preliminarily determine the category and shall attach a preliminary scoping memo"); Rule 7.5 (Quasi-legislative proceedings . . . shall include . . . [a]t least one workshop providing an opportunity for the parties to the proceeding to have an interactive discussion on issues identified in the scoping memo either in person or via remote participation; and . . . [a]t least one public engagement workshop to ensure that the issues are presented to members of the public who are not parties to the proceeding and members of the public have the opportunity to provide input into those issues.").

the Commission's view were correct, it could encourage parties to settle proceedings, adopt the settlements, wait until the parties' procedural and appellate rights are extinguished and their reliance on the adopted settlements complete, and then separately adopt "any . . . scheme it deems appropriate." *Resolution* at 3. For example, under the Commission's view, it could have unilaterally and without comment ordered Frontier to invest another $5 billion per year in capital expenditures for failure to meet the minimal service quality requirements. This is not the law, nor should it be.

Third, the Resolution claims that it "does not alter commitment #6 within the settlement agreement" and it does not "alter the requirements under General Order (G.O.) 133-D section 9." *Id.*, n. 4. Yet the Resolution applies incremental penalties for the same conduct as described in the Settlement Agreement and G.O. 133-D—failing to restore service outages within 24 hours. While the Settlement Agreement also imposes service quality conditions that exceed G.O. 133-D, they were fully disclosed and agreed to. By no means did Frontier agree to an undisclosed penalty scheme that far exceeds what was contemplated in the Settlement Agreement, nor would Frontier have acquiesced in such disproportionate penalties applicable only to Frontier. The Resolution cannot contradict and supersede the fines set forth in the Settlement Agreement, nor can it amend G.O. 133-D without following the process that it used to enact G.O. 133-D in the first instance, especially where the amendments apply only to one carrier. Moreover, the Resolution requires that the penalty amounts be paid "to the California General Fund instead of Frontier's network infrastructure." *Resolution* at 6. Thereby, the Commission punishes Frontier for "out of service" performance issues—in conflict with the Settlement Agreement—by taking money away from the source that could help solve those service quality issues.

Fourth, the Resolution's prescribed penalties are "arbitrary and capricious" because they do not reflect the application of the Commission's established five-factor test for determining appropriate penalties. Longstanding Commission precedent establishes that the Commission uses a "five-factor" test, with certain sub-factors, to evaluate the appropriate amount of penalties for any given conduct. In the seminal decision, D.98-12-075, the Commission outlined the following five factors to consider: (1) the severity of the offense; (2) the conduct of the utility; (3) the financial resources of the utility; (4) the totality of the circumstances; and (5) precedent. D.98-12-075 at 35-36.[27] The Resolution made no effort to apply these factors.

[27] *See also* D.16-05-001, at 5 ("[w]hen the Commission imposes a fine under §§ 2107 and 2108, we first

The Resolution recites a need for service reliability and 911 access, but it fails to justify why Frontier should be subject to a penalty that is substantially greater (*e.g.*, nearly five times greater) than other companies, some of whom have similar or worse "out of service" performance. Further, the Resolution does not consider the financial impact of potentially imposing $36 million in annual penalties on Frontier, as compared to Frontier's revenues or expenses generated in California from providing traditional telephone service, which is the only service within the scope of the "out of service" restoral standard. The Resolution does not consider whether the penalties would harm Frontier's ability to improve its service in California. Instead, the Resolution offers a misleading citation to Frontier's and all of its operating affiliates' *national* revenues, ignoring the much smaller revenues derived by the *regulated public utilities in California*. D.21-04-008 at 6, n.7 ("For a point of reference, thirty-six million dollars is about 0.4 percent of Frontier's nationwide annual revenues since Frontier acquired Verizon California's assets."). This focus on Frontier revenues in a vacuum also ignores the fact that other utility providers are much larger than Frontier. For example, AT&T is twenty-five times larger than Frontier in terms of national revenue, yet it is are subject to significantly lower levels of penalties than Frontier.[28] Again, to put the Resolution's penalty scheme in context, Frontier alone is subject to penalties of up to $36 million whereas, under G.O.133-D, the maximum annual penalty to all other carriers subject to G.O. 133-D is approximately $8 million for "out of service" restoral violations. *See* G.O. 133-D § 9.3; Res. T-17736 at 5; Res. T-17743 at 5-6.

The Resolution attempts to address its deviation from precedent by recasting the nature of its penalty scheme as "creating an enforcement mechanism, not imposing fines." *Resolution* at 16. But the Resolution undeniably imposes fines for failing to meet certain "out of service"

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look to Decision (D.) 98-12-075 and its progeny for guidance as to the appropriateness of the fine"); Res. T-17270 at 8 ("D. 98-12-075 serves as a guide in assessing a suitable penalty for violations of the Commission's rules and regulations.").

[28] AT&T's national revenue was $39.9 billion in 3Q 2021 compared to Frontier's $1.58 billion in 3Q 2021. *See* Frontier Communications Parent Inc., Quarterly Report (Form 10-Q) (Nov. 3, 2021) at 3 (available at https://www.sec.gov/ix?doc=/Archives/edgar/data/20520/000156276221000404/fybr-20210930x10q.htm); AT&T Inc. Quarterly Report (Form 10-Q) (Nov. 4, 2021) at 3 (available at https://www.sec.gov/ix?doc=/Archives/edgar/data/732717/000073271721000080/t-20210930.htm). The Commission should take official notice of these Securities and Exchange Commission ("SEC") filings pursuant to its authority under Rule 13.10. *See also* Evid. Code §§ 452(c), (h); *Apple Inc. v. Superior Court*, 18 Cal.App.5th 222, 242 (2017) (finding trial court properly took judicial notice of Apple's SEC filings and that there was not a reasonable factual dispute concerning their contents); *In re New Century Fin. Corp.,* 588 F.Supp.2d 1206, 1219 (C.D. Cal. 2008) ("It is well-established that courts may take judicial notice of SEC filings.").

performance standards, without exception. The penalties are formulaic and the Resolution does not appear to afford discretion in their implementation. As Frontier explained in its October 6, 2021 letter to the Commission addressing the final revisions to the Draft Resolution, some of the Frontier companies failed to meet the 90% restoral metric earlier in 2021 and would have been subject to monthly penalties of approximately $2 million per month.[29] The Resolution predetermines the consequences of falling below the "out of service" restoral threshold, so the "mechanism" is in effect the imposition of a fine. While the Resolution generically references an administrative appeal process whereby Frontier could challenge the factual basis for the penalties, the Resolution does not provide any apparent mechanism to challenge the *amounts* of the penalties, which have been fixed by the Resolution. *See Resolution* at 13 (citing Res. ALJ-377).

VI. THE COMMISSION'S RESOLUTION VIOLATES THE U.S. AND CALIFORNIA CONSTITUTIONS.

A. The Resolution's Penalties Are Unconstitutionally Excessive and In Violation of Substantive Due Process Protections.

The Resolution violates the excessive fines clauses of both the U.S. and California constitutions. *See* U.S. Const. amend VIII (imposing "limits on] the government's power to extract payments . . . as punishment for some offense."); Cal. Const. art. I, § 17 ("Cruel or unusual punishment may not be inflicted or excessive fines imposed."). For the same reasons, the Resolution also violates principles of substantive due process protected under the Fourteenth Amendment of the U.S. Constitution.

The Supreme Court has determined that the Eighth Amendment's prohibition against excessive fines applies to the states through the Fourteenth Amendment. *Timbs v. Indiana*, 139 S.Ct. 682, 691-692 (2019). In a recent case applying *Timbs*, the Ninth Circuit held that the Eighth Amendment's prohibitions apply not just to criminal fines, but also to civil fines imposed by state and local authorities. *Pimentel v. City of Los Angeles*, 966 F.3d 934, 938 (9th Cir. 2020), *modified on other grounds, reh'g denied*, 974 F.3d 917 (2020). Accordingly, the Eighth Amendment's limits on excessive fines apply to the Resolution.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the

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[29] *See October 6, 2021 Letter* at 3.

gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The Supreme Court weighs four factors when determining whether a fine violates the Eighth Amendment: (1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense. *Id*. at 336-37; *see also Pimentel v. City of Los Angeles*, 966 F.3d at 938 (applying the *Bajakajian* four-factor analysis to a civil fine imposed by a municipal jurisdiction). The California Supreme Court has applied substantially the same test for potential violations of the California constitution's excessive fines clause. *See, e.g.*, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005).

Applying the *Bajakajian* factors to the Resolution's penalty framework shows that it violates both the U.S. and the California constitutions. No matter how the Commission tries to justify them, the penalties imposed by the Resolution are disproportionate.

First, the Resolution provides no room to consider the nature of the offense because the penalties are imposed on a strict liability basis. For example, if Frontier's network violates the 90% "out of service" restoral standard in G.O. 133-D by even a fraction of a percent, then the exorbitant penalty applies without regard to the reason for Frontier's non-compliance. The Resolution imposes a minimum penalty of $2.1 million for missing the 90% "out of service" restoral standard for a single month, which will be assessed without evaluating the specific nature of the conduct giving rise to the performance. Moreover, there is no showing that the nature of the offense is either reprehensible or undertaken with intentionality.

Second, there are no illegal activities associated with Frontier's operation of its network. Rather, Frontier is trying to provide a vital service to California residents to the best of its ability.

Third, Frontier is already subject to significant penalties under G.O. 133-D, and additional penalties pursuant to the Settlement Agreement approved by the Commission, for non-conformance with the same "out of service" performance standards addressed by the Resolution. The Resolution would facilitate a third layer of cumulative penalties for the same conduct.

Fourth, the "out of service" performance failures do not cause harm sufficient to justify tens of millions of dollars in penalties. In some cases, those outages of traditional telephone service may be mitigated by the consumer having access to and using a cellular phone to make and receive voice calls during the period of the traditional telephone service outage.

Furthermore, the Resolution fails to consider that as Frontier continues to improve its service and reduces the total number of "out-of-service" conditions, there is an increased risk that a small number of difficult to restore service outages will subject the company to penalties. As Frontier explained in its October 6, 2021 letter to the Commission, the three Frontier companies had a total of 269 (out of 2081) and 217 (out of 1802) customers in January and February 2021, respectively, whose telephone service was not restored within the 24-hour restoral period. This resulted in combined restoral results for the three ILECs of 87.07% in January 2021 and 87.96% in February 2021 and would have resulted in a penalty of $7,702 and $9,619 per each missed "out of service" restoral in January and February, respectively, resulting in total penalties of approximately $4 million for these two months. As these figures show, a very small number of California customers experiencing outages of greater than 24 hours can subject Frontier to grossly disproportionate penalties per customer outage lasting longer than 24 hours, especially when compared to the charges paid by consumers for telephone service. *See October 6, 2021 Letter*, Attachment. The Resolution's failure to give any consideration to these aberrational results or the nature of Frontier's conduct violates the protections afforded to Frontier under the Fourteenth Amendment.

Paralleling the "excessive fines" analysis, the Supreme Court has also stated that a punitive damages award that is "grossly excessive" violates the Fourteenth Amendment's substantive protections. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *see also Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001) ("The Due Process Clause of its own force prohibits the States from imposing 'grossly excessive' punishments on tortfeasors.") (citations omitted). "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North Am. v. Gore*, 517 U.S. at 575. Factors to examine when evaluating that "indicium" include whether there is a "deliberate false statement," "act[] of affirmative misconduct," or "concealment of evidence of improper motive." *Id.* at 579. None of those factors is present here. The Resolution's strict liability approach imposes exorbitant penalties irrespective of the conduct that led to the service performance standard failures. Thereby, the Resolution does not appropriately account for Frontier's culpability or other constitutionally significant factors in assessing such an extreme penalty.

B. The Procedural Deficiencies in Adopting the Resolution Deprived Frontier of Procedural Due Process.

Under the Fourteenth Amendment of the U.S. Constitution, and parallel provisions of the California Constitution, corporations cannot be deprived of property without "due process of law." *See* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); Cal. Const. art. I § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."). The cornerstone of procedural due process is the opportunity to be heard and to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (citation and internal quotation marks omitted). The adequacy of governmental notice is essential to any evaluation of the sufficiency of procedural due process. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.") (citation and internal quotation marks omitted).

According to the Resolution, Frontier must now operate under the constant peril of severe financial penalties—more onerous and out of step with the penalties applicable to its competitors—for "out of service" performance problems. This is despite Frontier receiving no notice from the Restructuring Decision that the Resolution could greatly expand and multiply its liability for "out of service" restoral performance failures. The Commission did not notify Frontier at a "meaningful time" or in a "meaningful manner" that its Settlement Agreement could or would be materially changed. Rather, the Commission approved the Settlement Agreement without modification to the "out of service" restoral standards or applicable penalties for failing to meet the G.O. 133-D standards. The Commission caused Frontier to rely on its approval of the Settlement Agreement and to commit to a restructuring predicated on that reliance, only to later override and significantly change the compromise that was reached in ways that vastly increase Frontier's financial liabilities. The Commission thereby deprived Frontier of procedural due process.

C. The Resolution Denies Frontier's Constitutional Right to Equal Protection Under the Law.

The Resolution violates the equal protection clauses of the U.S. and California constitutions because it treats Frontier differently from similarly situated companies without justification. The equal protection clause of the U.S. Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is well settled that this clause applies to corporations. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780, n.15 (1978) ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."); *Walgreen Co. v. City & Cty. of San Francisco*, 185 Cal.App.4th 424, 434 (2010). Like the U.S. Constitution, the California Constitution provides that no person shall be "denied equal protection of the laws." Cal. Const. art. I, § 7(a); *see also Reece v. Alcoholic Beverage Control Appeals Bd.*, 64 Cal.App.3d 675, 679 (1976) ("The equal protection standards under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution are substantially the same.").

The first requirement of an equal protection claim is to show that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *People v. McKee*, 207 Cal.App.4th 1325, 1334 (2012) (citation and internal quotation marks omitted.). "Equal protection applies to ensure that persons [or corporations] similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment." *Id.* at 1334–35. The Resolution treats Frontier differently by exposing Frontier to potential penalties of nearly five times the maximum amount of penalties applicable to all other carriers subject to the G.O. 133-D penalty mechanism in California *combined*. This is disparate and inequitable treatment.

The second requirement is to show that the government did not have sufficient reason to distinguish between the two groups. *In re Brian J.*, 150 Cal.App.4th 97, 125 (2007) ("When a showing is made that two similarly situated groups are treated disparately, the court must then determine whether the government had a sufficient reason for distinguishing between them."). The Resolution offers no reason why Frontier should be subject to penalties nearly five times greater than all other telecommunications providers in California who are subject to the G.O. 133-D penalty mechanism *collectively*.[30]

The Resolution purports to "encourage compliance with Commission requirements, provide Staff with an additional tool to address non-compliance, and will allow the Commission

[30] As explained above, the total penalty mechanism applicable to all other carriers who are subject to the G.O. 133-D penalties for "out of service" restoral is $7,832,700. *See* G.O. 133-D § 9.3; Res. T-17736 at 5; Res. T-17743 at 5-6.

to take prompt action." *Resolution* at 18 (Finding 6). The Resolution also notes that it advances public safety objectives by achieving "the general deterrence needed to encourage the regulated entity to anticipate, identify, and correct violations" and "ensuring that the communities of which Frontier serves will have reliable access to 911 services, 211 services, and the capability to receive emergency alerts and notifications." *Id.* at 13. Finally, the Resolution "aims to ensure" that Frontier "compl[ies] with its obligation to all of the requirements, terms, and conditions pursuant to [the transfer of control decision." *Id.* at 1. But none of these purported purposes is rationally related to the differential treatment of Frontier compared to the rest of the industry.

The Resolution does not provide a factual basis for establishing Frontier alone as a Commission-directed "guinea pig" for greatly enhanced penalties when G.O. 133-D imposes significantly lower penalties to all market participants the same deterrence and public interest objectives. *See* D.16-08-021 at 32 (Finding 10); 33 (COL 2, 7). Nowhere does the Resolution explain why Frontier should be subject to penalties greater than other utilities with worse "out of service" performance. Frontier only serves approximately 13% of the working access lines for carriers subject to G.O. 133-D penalties, yet the Resolution imposes penalties on Frontier 460% higher than the "out of service" restoral penalties imposed on all of those other carriers combined. The means detract from the purported ends. The penalties are so large that they could jeopardize Frontier's ability to operate in California altogether.

D. The Prescribed Penalties for Future Data Request Responses Are Unconstitutionally Vague.

The Resolution's penalties for future data request compliance are void for vagueness under the due process clauses of the state and federal constitutions. U.S. Const. amend. XIV., § 1; Cal. Const., art. I § 7. Where a law fails to provide "fair notice of what is prohibited," it is unconstitutionally vague. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation and internal quotation marks omitted). It "is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them," but "it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158-159 (2012). Constitutional vagueness prohibitions apply to administrative regulations. *See, e.g.*, *Cranston v. City of Richmond*, 40 Cal. 3d 755, 756-57 (1985) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”).

The Resolution provides that “Frontier shall pay $1,000 per day for each of its utility numbers for each late or incomplete submission of responses to a data request.” *Resolution* at 7. The Resolution’s penalty applies to “data requests” that have not yet been issued and whose scope, contents, timing, extent, relevance, and subject matter are unknown. Despite these unknowns, the Resolution provides that these substantial penalties will apply whenever Staff deems a data request “late,” or Frontier’s response “incomplete.”

The Resolution does not define “data request,” “late” or “complete.” These are all subjective terms, and are thus prone to discriminatory and arbitrary enforcement. *See People v. Leon*, 181 Cal.App.4th 943, 952 (2010) (finding that the word “frequent” rendered the probation condition the defendant was subjected to was unconstitutionally vague because it was both obscure and had multiple meanings). As such, the Resolution is unconstitutionally vague and violates Frontier’s right to due process.

VII. REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 16.3, Frontier hereby requests oral argument in connection with this Application for Rehearing. Oral argument is appropriate on rehearing where the application raises issues of “major significance” to the Commission because the challenged decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact. *See* Rule 16.3(a). The legal errors that Frontier has identified in the Resolution satisfy each of these elements.

First, the Resolution “departs from existing Commission precedent” by deviating from both the Restructuring Decision and G.O. 133-D. The Resolution does not admit this divergence, let alone provide “adequate explanation” for it. Indeed, no explanation could justify the Resolution’s fundamental departure from a Commission directive. Nor could any explanation justify the creation of a special set of rules for one carrier without a fulsome development of a record and an opportunity to be heard through a full evidentiary process.

Second, the Resolution “changes . . . existing Commission precedent.” The Restructuring Decision and Resolution serve as a “bait and switch.” The Restructuring Decision approved the Settlement Agreement, in which Frontier agreed to accept a known set of commitments. The

Resolution then upended those commitments by expanding them under the faulty guise of an enforcement program. Allowing such a process will negatively impact all future applicants and proceeding participants, who will have no assurance that their settlement agreements will be honored or that the Commission's requirements will not shift after placing extensive detrimental reliance on their terms. As TURN pointed out in comments on the Draft Resolution, the Commission should "create policies and adopt regulations that support the value of settlements and encourage parties to enter into settlement agreements by ensuring regulatory certainty that those settlements will be upheld." *Aug. 5, 2021 Opening Comments of the Utility Reform Network on Draft Resolution T-17734* at 4. The Resolution will discourage future settlements if the Commission does not rectify this erroneous process.

Third, the Resolution's approach to the penalty mechanism is a matter of "public importance." Frontier is a Carrier of Last Resort ("COLR") and one of the major providers of telecommunications service in California. This Resolution creates major competitive and regulatory disparities between Frontier and its competitors, potentially destabilizing the market. This creates significant potential for consumer harm. Therefore, the legal and evidentiary foundation of this Resolution is critically important and warrants close examination by the Commissioners in oral argument.

Fourth, the Resolution sets a damaging precedent that the terms of Commission decisions in "transfer of control" matters can be modified retroactively through the resolution process, even where the parties have no notice that material changes are possible. The Commission considers multiple "transfer of control" applications each year, so the legality of the Resolution's penalty scheme is likely to impact many other cases, including those currently pending before the Commission, and others to come.

The broader context of this matter also favors oral argument. The Frontier bankruptcy and restructuring was a major industry event, which merits the Commission's careful attention. The Resolution upsets the balance that was achieved in the Restructuring Decision and installs a discriminatory penalty scheme that will likely strip Frontier of capital that could otherwise be used for capital improvements or service quality enhancements. Both the overall posture of this matter and the numerous, specific legal errors that it presents justify a close consideration of this Application for Rehearing before the Commission faces these arguments in the courts.

VIII. CONCLUSION.

Based on the legal errors demonstrated herein, the Resolution should be withdrawn on rehearing or modified to remove the unlawful, disproportionate penalties that it imposes uniquely on Frontier.

Respectfully submitted this 11th day of November 2021 at Oakland, California.

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Attorneys for Frontier

VERIFICATION

I, Allison M. Ellis, am an officer of Frontier Communications Parent, Inc., employed as its Senior Vice President of Regulatory Affairs, and I am authorized to make this verification on behalf of Frontier Communications Parent, Inc., Frontier California, Inc., Citizens Telecommunications Company of California, Inc., Frontier Communications of the Southwest, Inc., Frontier Communications Online and Long Distance, Inc., and Frontier Communications of America, Inc.

I have read the foregoing Application, and I know the contents thereof, from my own knowledge and/or from discussing its contents with other knowledgeable employees and/or representatives of Frontier Communications Parent, Inc., Frontier California, Inc., Citizens Telecommunications Company of California, Inc., Frontier Communications of the Southwest, Inc., Frontier Communications Online and Long Distance, Inc., and Frontier Communications of America, Inc. The matters stated therein are true of my own knowledge or I am informed and believe that they are true, and on that basis, I allege that the matters stated therein are true.

Executed this 11th day of November 2021 in Chapel Hill, North Carolina

A Ellis

Allison M. Ellis
Senior Vice President, Regulatory Affairs

Attachment A

From: TD_AR <td_ar@cpuc.ca.gov>
Sent: Wednesday, October 13, 2021 7:40 AM
To: Darren Lee
Subject: T-17734 Adopted Notice of Availability Frontier Enforcement Program

CD/WOW
Mailed 10/13/2021

Resolution T-17734; October 7, 2021

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RESOLUTION T-17734. Approves the adoption of an Enforcement Program to ensure compliance with the requirements, terms, and conditions pursuant to Decision 21-04-008 by Frontier Communications Corporation and its California local exchange and long-distance subsidiaries.

Adopted Notice of Availability

To: Parties on the attached service list.

Adopted Resolution T-17734 has been made available on October 12, 2021. This approves the adoption of an Enforcement Program to ensure compliance with the requirements, terms, and conditions pursuant to Decision 21-04-008 by Frontier Communications Corporation and its California local exchange and long-distance subsidiaries.

Any recipient of this Notice of Availability who is not receiving service by electronic mail in this proceeding or who is unable to access the link to the Commission website given above may request a paper copy of the final resolution from the Commission's Central Files Office at (415) 703-2045, fax (415) 703-2263, or e-mail CEN@cpuc.ca.gov.

Notice of this item was also sent by e-mail to those on the service list with an e-mail address. If you did not get e-mail notification, please check your e-mail address by accessing the link above. If this is not correct, please contact Process Office with an update at (415) 703-2021, fax (415) 703-2823, or e-mail processoffice@cpuc.ca.gov.

Dated October 13, 2021, at San Francisco, California.

Service List for Resolution T-17734

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From: "Tan-Walsh, Llela" <llela.tan-walsh@cpuc.ca.gov>
Date: Monday, October 25, 2021 at 4:40 PM
To: Patrick Rosvall <patrick@brblawgroup.com>
Cc: "Osborn, Robert B." <robert.osborn@cpuc.ca.gov>, "Hernandez, Risa" <risa.hernandez@cpuc.ca.gov>, "Tan-Walsh, Llela" <llela.tan-walsh@cpuc.ca.gov>
Subject: RE: [EXTERNAL] Re: CPUC Adopted Resolution T17734 - Frontier Enforcement Program - updated

Hi Patrick –

Thank you for your patience.

Per internal discussion, the October 12 date was definitely an error; however; the ANOA was also dated for October 13, 2021 at the bottom of the notice and the email was clearly sent on October 13, 2021 – which you received on the same day. Therefore, there is adequate support that the service list was noticed on October 13, 2021 and the due date for rehearing would be within 30 days after the date the Commission mails the order or decision (pursuant to Rules of Practice and Procedure Section 16.1).

We will not reissue the ANOA.

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